

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1414

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

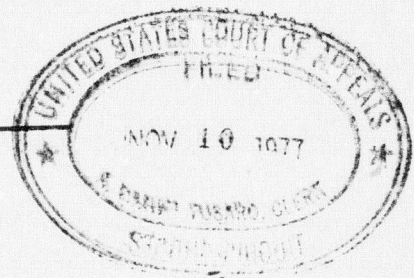
-against-

ERNEST MALIZIA,

Appellant.

*On Appeal from the United States District Court
for the Southern District of New York*

APPELLANT'S BRIEF



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

77-1414

-v-

ERNEST MALIZIA,

Appellant

APPELLANT'S BRIEF

STATEMENT OF ISSUES

1. Whether the denial of Malizia's timely motion to represent himself was error requiring reversal and remand for a new trial?
2. Whether it was error to deny Malizia a new trial or, in the alternative, a hearing based on his charge of selection prosecution?

PRELIMINARY STATEMENT

This is an appeal from a judgement of conviction entered on June 15, 1977 and from the order denying appellant's motion to vacate judgement and for a new trial entered on September 19, 1977 in the United States District Court for the Southern District of New York (Cooper, J.)

Appellant Ernest Malizia was found guilty, after a trial by jury, of conspiring to violate the narcotics laws in violation of Title 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A). Malizia was sentenced to 15 years imprisonment to run consecutively with any other sentences previously imposed,* a \$25,000 committed fine, and special parole term of six years.

Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, Malizia moved for an order vacating the judgement entered and for a new trial. This motion was denied in a Memorandum order on September 19, 1977.

Mr. Malizia is presently incarcerated.

*Mr. Malizia had previously been sentenced in the Southern District of New York in March, 1974 to ten years imprisonment for violation of the narcotics laws (Motley, J.) and, on May 24, 1977, to five years imprisonment (consecutively) upon his plea of guilty for escape from federal detention (Werker, J.).

STATEMENT OF FACTS

A. THE GOVERNMENT'S CASE

In late February 1973, Mario Perna met with Ernest Malizia, whom he had known for several years, at the Evergreen Bar in Brooklyn, New York, and agreed with him to go into the narcotics business (Tr. 55).^{*} Over the next several days, they attempted to locate a source of supply for heroin (Tr. 61), and finally met with Frank Pallatta (Bolot), with whom Malizia had had prior dealings. Malizia asked Pallatta whether he could obtain heroin for them. Pallatta replied that he would have to check with his partners. Pallatta, Perna and Malizia agreed to meet again the following Sunday night at the Raceway Diner in Yonkers, New York (Tr. 70-74).

The following Sunday night at the Raceway Diner, Pallatta told Perna and Malizia that he had spoken to his partners and they would supply two kilos at \$25,000 per kilo. (Tr. 75-77).

The next night Pallatta met with Perna and Malizia and told them the heroin would be delivered by a person named "Skooch"***whom they could find that night at the Allerton Theater on Allerton Avenue in the Bronx, and that they could have a week to ten days to pay for it (Tr. 82). Pallatta, Perna and Malizia agreed to meet again the following Sunday night (Tr. 77), and Perna and Malizia left. They drove to the Allerton Theater where, after a while, Skooch arrived. Malizia spoke with Skooch, and Skooch then delivered two kilos of heroin in a bag to Perna (Tr. 84-87).

Perna tested the potency of the heroin by having an addict named Flaco inject it (Tr. 88-89). Being satisfied with the quality of the heroin they had gotten from Pallatta, Perna and Malizia tried to sell it in bulk,

*"Tr." refers to the trial transcript.

** "Skooch" was identified as Frank Ferraro and was indicted in this case.

but were unsuccessful. They therefore decided to sell it in one-eighth and one quarter kilo quantities (Tr.92-95). This they did over the next several days to Flaco, Joseph Condello ("Condello"), John Gwynn, and two persons whom Perna knew as "Joe" and "Cass", respectively (Tr. 95-110).

At about the same time, William Chapman, "Chappy", introduced St. Julian Harrison ("Harrison") to Perna and Malizia, and Harrison agreed to buy from them three kilos of heroin at \$28,000 each (Tr. 137-140).

Perna and Malizia then met Pallatta and asked for an additional four kilos (Tr. 142). These were delivered to them by Skooch at the Allerton Theater and they in turn, further diluted the heroin and delivered three kilos of it to Harrison (Tr. 147-152).

Harrison was unable to pay, and introduced Perna and Malizia to Frank Lucas who told them he would assume Harrison's liability and could buy all the heroin they could supply, but only if the price and possiblty the quality, were better.

Several days later Lucas gave Perna and Malizia \$56,000 in cash in part payment for the three kilos, and they later gave this \$56,000 to Pallatta, Magnano, Donnie Boy and Skooch at the Adventurers Inn (Tr. 174-179).

In early April, Skooch delivered a further six kilos of heroin from Pallatta's group to Perna and Malizia. Perna and Malizia then sold six kilos to Lucas for \$25,000 each, and delivered them in the same suitcase in which they had come from Skooch (Tr.191-193).

From April 1973 through the beginning of August 1973, Perna and Malizia delivered approximately 35 kilograms of heroin to Lucas for which he paid them approximately \$800,000 in cash (Tr. 194-195). Perna testified they obtained this heroin from Pallatta, Magnano and Donnie Boy. Other customers were also being supplied during this time by Perna and Malizia.

In early September 1973, Verzino, who had been released from the Atlanta Penitentiary in August after serving a sentence for a federal narcotics violation, met in Brooklyn with Perna, an old friend, and Malizia. (Tr. 207-209). They told Verzino that they were partners in the heroin business and Perna said they had gotten narcotics from some "old friends" of Verzino's, namely Pallatta, Magnano and Richard Bolella, all of whom Verzino had known nearly all his life and with whom we had had narcotics dealings prior to his incarceration in 1966 (Tr. 207-212).

A few days later, Perra testified they met with Verzino and Verzino said he would join them in their narcotics business (Tr. 214-216; 830). Verzino told them that he would look around for some new customers and a source of supply for pure heroin and help them with the regular customers. (830-835).

Early in November 1973, Verzino testified he met with Anthony De Lutro, whom he had known for years, at Raymond's Restaurant, 29th Street and Second Avenue, Manhattan.* Verzino said De Lutro could obtain pure heroin (Tr. 876).

Verzino then met with Perna and Malizia, and they agreed Verzino should try to purchase pure heroin from De Lutro (Tr. 876-878).

Verzino thereafter again met De Lutro at Raymond's. After some bargaining, Verzino and De Lutro agreed that De Lutro would sell Verzino five kilos of pure heroin for \$250,000 with over \$200,000 to be paid in advance. An appointment was made for the transaction to be consummated the next evening (Tr. 876-882).

Verzino, Perna and Malizia raised \$234,000 in cash the next day (Tr. 883). They then went to the vicinity of Raymond's bar, and, after leaving Perna and Malizia at another nearby bar, Verzino went into Raymond's and met with De Lutro. He told De Lutro he had \$234,000. The money was

*De Lutro was also known as "Tony West".

given to De Lutro immediately thereafter on a side street outside Raymond's by Verzino placing the box in which the money was contained into the trunk of a car which De Lutro was driving. (Tr. 883-886).

The next night Verzino met with De Lutro in the vicinity of the Hill Cafe in Manhattan and, on De Lutro's instructions, took a box from the trunk of De Lutro's car. (Tr. 888-890).

Later that night Verzino, Perna and Malizia weighed and tested the heroin De Lutro had sold them. The test revealed that the heroin was pure, but approximately eight ounces less than the five kilos De Lutro had agreed to sell. After some discussions as to whether they should return the heroin, it was agreed that they would keep it but tell De Lutro about the shortage. Verzino then told De Lutro that the heroin was acceptable but there was a shortage, which De Lutro agreed to make up later. (Tr. 890-897).

After their purchase of pure heroin from De Lutro, Verzino, Perna and Malizia, in late November, met Pallatta and Magnano. They discussed the quality of the heroin Pallatta's group was selling them, and the possibility that they could buy pure heroin from Pallatta's group. Malizia told Magnano that they had five kilos of pure heroin on hand, and Magnano became upset and accused them of using money they owed him to buy heroin from others. Notwithstanding this displeasure, he and Pallatta agreed to sell an additional twelve kilos of heroin to the partnership (Tr. 251-255; 912).

Malizia was arrested in the Bronx on December 18, 1973, as a fugitive. In his possession was a coded list of phone numbers and a drivers license under the name of Harry Luppess. (Tr. 276,914).

After Malizia's arrest, Verzino and Perna met with Lucas to discuss money. Verzino then offered to sell Lucas a kilo of pure heroin for \$110,000. Lucas agreed to purchase approximately 1/8 kilo of pure heroin as a sample.

Perna later informed Verzino that he had given the pure heroin to Lucas (Tr. 930-935).

Perna's relationship with Verzino began to deteriorate at this point (Tr. 289). On January 7, 1974, Perna went to the Steak and Brew Restaurant in Ft. Lee, New Jersey, where he met with Condello and "Jimmy". Perna had sold heroin to Condello three or four times previously while Jimmy was present. Condello had introduced Jimmy to Perna as Condello's partner. Perna was unaware that Condello was now cooperating with the federal authorities and wearing a recording device, and that "Jimmy" was Special Agent James Bradley of the Drug Enforcement Administration ("DEA") (Tr. 287-293, 696-710).

During a conversation between Perna and Condello, which took place outside the presence of Special Agent Bradley but which was recorded, Perna asked Condello to kill Verzino for him because, he said, Verzino was jeopardizing his safety. Perna also expressed concern that Verzino may have been planning to eliminate him from the partnership. In the course of the conversation, Perna made reference to his sources of supply for narcotics, and his largest customer, but did not mention any names. Condello agreed to kill Verzino; a few days later Perna gave Condello and Bradley a shotgun and a pistol for this purpose. (Tr. 733-740, 303-307).

In late January 1974, Anthony Soldano delivered to Verzino three kilos of pure heroin, a transaction arranged by Joseph Malizia (Patsy Pontiac). (Tr. 307-330, 944-960). He paid \$75,000 and owed \$75,000. (Tr. 958).

On February 1, 1974, Perna was arrested in New Jersey by federal authorities. At the time of his arrest, Perna had in his possession eight kilos of diluted heroin which he had planned to deliver to Condello and Bradley. (Tr. 333-338).

The arresting officers also seized from Perna a list of telephone numbers and a piece of paper listing his heroin customers, moneys owed him,

and his own owings for heroin transactions.

On February 25, 1974, Verzino and Frank Caravella, who became Verzino's partners at this time, were arrested in front of 1130 Pelham Parkway in the Bronx. Subsequent to their arrests they were taken to apartment 4J at that address, which Verzino was then using as a stash for narcotics, where the arresting officers seized approximately 26 pounds of heroin. (Tr. 965-972).

Verzino also identified a paper seized from his person at the time of his arrest as a narcotics customer list listing the amounts owed him and by whom.

In May or June 1974, Perna and Malizia met Lucas in the Federal House of Detention in New York, where all three were then incarcerated. Perna testified they asked Lucas for the money he owed. Lucas told Perna and Malizia he would make certain they received their money but would not be able to pay the entire sum at one time. He said he would make arrangements with his then attorney, Mr. Galina. (Tr. 364-368)

Two or three weeks later, after Lucas was released from custody, Malizia told Perna that he had met with Galina in the interview room at the jail who told him that Lucas had given him \$25,000 for Perna and Malizia (Tr. 368-369).

Approximately two weeks later, Malizia told Perna he had again spoken with Galina, and had proposed to pay Galina 10% of the first \$100,000 and 5% of the balance if Galina would help to get the debt paid (Tr. 913-14). When no additional moneys were forthcoming, Perna and Malizia met Galina in the interview room at the jail. (Tr. 376-378)

On September 22, 1974, Perna and Malizia escaped from the detention center. (Tr. 385-389). Perna was recaptured a few weeks later.

On January 28, 1975, Lucas was arrested at his residence at 933 Sheffield Road, Teaneck, New Jersey. Agents of the DEA, pursuant to a search warrant, seized \$584,705 in cash from inside the residence and outside the bathroom window adjacent to the residence. They also seized several hundred clear plastic bags contained in a suitcase, and a heat sealing machine which was capable of sealing them (Tr. 1098-1105).

B. THE DEFENDANT'S CASE

John Gwynn, convicted in the previous trial of this indictment, testified on behalf of Malizia. He stated that his meetings with Malizia never involved any discussion of narcotics (Tr. 1157-1160).

C. MALIZIA'S MOTION TO REPRESENT HIMSELF

On April 19, 1977 Ernest Malizia submitted a notice of motion, affidavit, and brief to the District Court seeking disqualification of the trial judge and further requested "by the defendant acting in propria persona that his attorney of record be likewise be (sic) entirely dismissed from participating any further in my defense." (See, appellant's Appendix, pp A26-30 , Motion papers filed by Malizia in District Court; see also affidavit of Federico E. Virella in opposition to writ of Mandamus, Court of Appeals Docket No. 77-3025, paragraph 12 and Exhibit B thereto)

Malizia's trial counsel brought this motion to the attention of the court immediately after answering "ready", but before any trial proceedings began (See Appendix, pp A31-36 and Transcript of proceedings of April 19, 1977, pp 2-5) Counsel noted for the record that he had refused Malizia's prior request to prepare similar papers. The Court then denied the motion. Malizia filed a motion the next day in this Court for a writ of mandamus to recuse Judge Cooper. This motion was denied on April 28, 1977. (Docket 77-3025).

After Judge Cooper denied Malizia's motion, the selection of a trial jury began and continued till the middle of the next day, April 20, 1977, when the jury was sworn and the trial commenced.

At numerous times during trial, Malizia renewed his motion to represent himself at trial, often citing Faretta v. California, 422 U.S. 806 (1975) by name (See, eg., Tr. pp. 512, 518, 528, 535, 585, 640. See also, Tr. p. 405, statement by Mr. Stone and Malizia's Petition for Permanent Injunction Order, Court of Appeals Docket 77-3025).*

*Counsel did not note Malizia's pretrial request in the Rule 33 motion as counsel was not then in possession of a transcript for that date nor was counsel then aware of the full scope of the proceedings and papers in this Court's Docket 77-3025.

POINT I

THE DENIAL OF MALIZIA'S TIMELY
MOTION TO REPRESENT HIMSELF WAS
ERROR REQUIRING REVERSAL AND RE-
MAND FOR A NEW TRIAL.

- A. THE RIGHT TO REPRESENT ONESELF, AS SET FORTH IN 28 U.S.C. §1654 AND FARETTA v. CALIFORNIA, 422 U.S. 806 (1975), IS AN ABSOLUTE RIGHT IF INVOKED PRIOR TO THE COMMENCEMENT OF TRIAL.

Title 28 U.S.C. §1654 provides:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Cf. Faretta v. California, 422 U.S. 806 (1975).*

This Court has repeatedly held that the right of self-representation is protected by the Bill of Rights. In United States v. Platner, 330 F.2d 271 (2d Cir. 1964), this Court concluded that the Sixth Amendment right to the assistance of counsel was intended to supplement other rights of the defendant and not to interfere with "...the absolute and primary right to conduct one's own defense in propria persona." 330 F.2d at 274. As Judge Medina noted, "the right to counsel and the right to defend pro se in criminal cases form a single, inseparable bundle of rights, two faces of

*While Faretta involves a state proceeding, the ruling is based on a constitutional right and should apply with the same force and effect in a federal criminal proceeding. As the Court stated in Faretta:

In the federal courts, the right of self-representation has been protected by statute since the beginning of our Nation...The right is currently codified in 28 U.S.C. §1654. 422 U.S. at 812-813.

The right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged. 422 U.S. at 818

The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. 422 U.S. at 819-820.

the same coin." Id at 276. See also, United States ex rel. Martinez v. Thomas, 526 F.2d 750, 754 (2d Cir. 1975); United States v. Calabro, 467 F.2d 973, 985 (2d Cir. 1972); Phillips v. Tobin, 548 F.2d 408, 411 (2d Cir. 1976).

It is clear from the decisions of this Court and Faretta that the choice of how to proceed must be left to the defendant himself:

The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant-not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists...An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

422 U.S. 820-21 (footnote and citations omitted) (emphasis in original).

The trial court's only responsibility is to provide an adequate record to determine that the defendant "knows what he is doing and his choice is made with eyes open." Plattner, supra at 276.

Mr. Justice Stewart, in Farretta, spoke of the justification for the expected tension between the right to counsel and the right to appear pro se:

To force a lawyer on a defendant can only lead him to believe that the law contrives against him.

Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel

is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

422 U.S. at 834 (emphasis added). See, Brown v. Craven, 424 F.2d 1166, 1170 (5 Cir. 1970).

Further, it is well established in this Circuit and others that the right of a defendant in a criminal case to represent himself is unqualified if invoked prior to the commencement of trial. United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), cert. denied sub nom DeBlasi v. McMann, 384 U.S. 1007 (1966); Sapienza v. Vincent, 534 F.2d 1007, 1010 (2d Cir. 1976); See also, United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); Chapman v. United States, 553 F.2d 886, 893 (5th Cir. 1977). And it is also well established that this means the right to self-representation is timely if asserted before the jury is empaneled. Denno, supra at 16; Dougherty, supra at 1119, 1124; Chapman, supra at 894. If the right was timely asserted and denied, this Court should reverse the conviction and remand for a new trial due to denial of a fundamental constitutional right. "...even if no prejudice to (defendant) were shown to have resulted from the refusal to permit him to act pro se." Plattner, supra at 273. See also, Chapman, supra at 891.

- B. MALIZIA'S MOTION TO REPRESENT HIMSELF WAS MADE PRIOR TO THE COMMENCEMENT OF TRIAL AND, THUS, IT WAS ERROR FOR THE DISTRICT COURT TO DENY THE MOTION.

On April 19, 1977 the case of United States v. Ernest Malizia, was called and both sides answered "ready", but counsel for Malizia added:

...I think it would be incumbent upon all parties to have a conference in chambers before we proceed.

Transcript of proceedings dated April 19, 1977 p. 2 (Appellant's Appendix, pp A31-36) Such a conference was then held, whereupon trial

counsel informed the court and prosecutor that Mr. Malizia had prepared certain motions he wished to present to the court.* Counsel stated that "these motions are to disqualify you (the court) and fire me."

The motion and accompanying papers sought disqualification of the trial judge and further requested "by the defendant acting in propria persona that his attorney of record be likewise be (sic) entirely dismissed from participating any further in my defense." (Appellant's Appendix, pp A26-30) The trial court denied both motions. Malizia sought a writ of mandamus from this Court to require the trial judge to recuse himself, but this Court denied said relief on April 28, 1977 (Docket No. 77-3025).

The request by Malizia to dismiss his attorney should be held to be both timely and unequivocal, for it was brought squarely before the court prior to the commencement of trial. The court was notified, both by counsel and by the papers themselves, that Malizia no longer wished to be represented by said counsel and Malizia stated in his papers he was acting "in propria persona."** There was no request for new counsel or for an adjournment.

As to timeliness, this Court's decision in Denno could not have been more emphatic:

We hold that if (the defendants) clearly sought to represent themselves, after their cases had been called on the calendar but before the jury had been chosen, they had an unqualified right to have their requests granted. At this stage there was no danger of disrupting proceedings already in progress.

United States ex rel. Maldonado v. Denno, supra at 16; See also Stepp v. Estelle, 524 F.2d 447 (5th Cir. 1975); Chapman, supra at 894-895.

*Trial counsel had refused Malizia's request that counsel prepare the papers as counsel did not agree with Malizia's interpretation of the issue and facts.

**The government, in its papers to this Court opposing the motion for a writ of mandamus, attached thereto a copy of Malizia's motion papers in the District Court and also stated, "On April 19, 1977, the day of trial, Malizia acting pro se, moved to disqualify his attorney..." (Affidavit of Federico E. Varella, Jr., paragraph 12).

In Chapman v. United States, supra, the Fifth Circuit, in agreement with Denno, reversed a conviction due to the erroneous denial of a motion to proceed pro se made after counsel announced "ready for trial" but prior to the empaneling of the jury. The court held:

A defendant must have a last clear chance to assert his constitutional right. If there must be a point beyond which the defendant forfeits the unqualified right to defend pro se, that point should not come before meaningful trial proceedings have commenced.

553 F.2d at 895.

If it is found that Malizia did timely request that he be allowed to proceed pro se,* this Court should reverse his conviction and remand for a new trial due to the denial of a fundamental constitutional right. Faretta, supra; Denno, supra; Chapman, supra. This Court, and both the Fifth and District of Columbia Circuits, have held that the harmless error doctrine should not be applied to such a denial. Plattner, supra at 273; Chapman, supra at 891-892; Dougherty, supra at 1127-1130. A reversal must be ordered where this right is denied.

C. MALIZIA'S BEHAVIOR DURING TRIAL DID NOT AMOUNT TO A WAIVER OF HIS ABSOLUTE RIGHT TO REPRESENT HIMSELF.

On April 20, 1977, the day after Malizia's motion to represent himself was denied, jury selection was finished and the trial began. At numerous times during the trial, Malizia renewed his application to proceed pro se, but the trial court denied his motion. (See e.g., Tr. 512, 518, 528, 586, 640) Malizia advanced objective, substantial reasons for his desire to represent himself and even made an offer of proof to show that certain actions of counsel were detrimental to Malizia's interests. It is clear that there was a serious and total failure of trust and communication between Malizia and his counsel,

*While Malizia did not specifically cite Faretta until his mid-trial renewal of this motion, it is clear from his motion papers of April 19, that he wished to dismiss counsel and conduct his own defense.

a situation which was originally brought to the court's attention prior to trial and which was exacerbated by the court's improper treatment of a timely pro se request. In such an atmosphere of hostility, distrust, and divided loyalties, the request to proceed pro se was the only rational choice for Malizia.

To thrust counsel upon the accused, against his considered wish, thus violates the logic of the (Sixth) Amendment. In such a case, counsel is not an assistant, but a master...An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction.

Faretta, supra at 820 (footnote omitted). See also, Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970).

Subsequent to the trial court's denial of the motion to represent himself, certain actions of Malizia during the course of trial were characterized by the trial court as disruptive and obstreperous. (Tr. 553-557 and memorandum of Judge Cooper denying the new trial motion, p. 8). While certain actions of Malizia could be so characterized in a vacuum, these incidents occurred only after Malizia renewed at trial his pre-trial motion to proceed pro se and only after the denial of that motion.

While it is clear that the right to appear pro se may be waived by, inter alia, deliberately engaging in "serious and obstructionist misconduct"*, "it would be anomalous to hold that the denial of one's rights can be justified by reference to the nature of subsequent complaints protesting that denial. Dougherty, supra at 1126-1127. The Court of Appeals for the District of Columbia held, reversing a conviction for denial of the statutory right to appear pro se, that to allow the use of subsequent incidents concerning the denial to work as a waiver of this right, "...is like using the fruit of an unreasonable search to provide a cause making the search reasonable."

*Faretta, supra at 835 n 46, citing Illinois v. Allen, 397 U.S. 337 (1969).

Id. at 1126. As in Dougherty, here nearly all the possible incidents that could be characterized as "disruptive" concerned assertions of the right to self-representation. This should not be used to justify the prior, erroneous denial of the right.

A fundamental constitutional right should not be waived where the predicate of behavior was the improper denial of such right. The Supreme Court has emphasized that one of the most important functions of a criminal trial is to show both society and defendants that justice is done in our courts. Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942). The approach and demeanor of the trial court towards Malizia could only have had the opposite effect.

As to any possible actions prior to the pro se request or any not concerning the pro se request, counsel submits that these are not the "disruptive actions" that warrant denial on that basis alone. The Allen test requires some intent to seriously obstruct or upset the trial proceedings. Malizia's behavior, when not part of his requests to appear pro se, cannot be characterized this way. For example the trial court did admonish Malizia as to his facial expressions and stated they would prejudice the jury, but this cannot be considered "disruptive" or "obstreperous." (Tr. 20-23,410)

D. EVEN IF MALIZIA'S REQUEST IS FOUND TO BE PRESENTED FOR THE FIRST TIME AFTER TRIAL COMMENCED, THE TRIAL COURT'S FINDINGS WERE IMPROPER AND INADEQUATE AS A MATTER OF LAW.

When confronted with a mid-trial request to appear pro se, trial judges have been instructed by this Court to provide

...a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress...

United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), cert. denied 384 U.S. 1007 (1966); See also Sapienza v. Vincent, 534 F.2d 1007 (2d Cir. 1976). Yet, the trial court interpreted this standard as requiring a finding of whether or not to proceed pro se is "in the interests of the defendant." (Tr. 553-557).

The test is not to ascertain which course will be most beneficial to the defendant, but rather the reason for the request and the course of the prior proceedings versus the possibility for disruptive behavior or unnecessary delay in pending proceedings.

There has never been any question by any of the parties to this proceeding or the trial court that Malizia is competent and able to understand the proceedings. He also has sufficient familiarity with courtroom procedures so as not to unduly hamper the proceedings. See United States v. Tragnell, 512 F.2d 10 (9th Cir. 1975). While his education is not extensive, the trial court did fear Malizia was attempting to manipulate the proceedings and noted his cunning (Tr. 554).

The Supreme Court, in Faretta, made it clear that the issue of harm to the defendant's interests is up to the defendant alone as he is the one to suffer the consequences of his choice. 422 U.S. at 834. The only issue to be resolved under Denno is whether the potential for disruption or delay by granting the motion is greater than the prejudice to defendant by denying the motion. If so, the trial court, in its discretion, may deny the motion. Clearly, the record below was inadequate as a matter of law to make such a finding, for the potential for disruption was generated by the trial court's erroneous denial of the first and the renewed pro se motions, not be intentionally obstructionist behavior. See Dougherty, supra at 1126.

The trial court improperly addressed the otherwise commendable issue of what was the best choice to provide Malizia with a fair trial. But Farretta, Denno, and the other case law cited above, recognize that the defendant need not make the best choice as long as it is his choice, nor should the court deny a mid-trial motion unless the potential for disruption outweighs the prejudice caused by a denial to the legitimate, pro se interests of the defendant. Thus, the trial court improperly denied the mid-trial motion to proceed pro se as the

court did not apply the proper test as set forth in Denno.

POINT II

IT WAS ERROR TO DENY APPELLANT A NEW TRIAL OR, IN THE ALTERNATIVE, A HEARING BASED ON HIS CHARGE OF SELECTIVE PROSECUTION.

It is appellant's position that the evidence below, eg., the affidavit of Assistant U.S. Attorney Virella, was insufficient to justify denial of his motion for a new trial or, in the alternative, a hearing on said charge of selective prosecution. Snowden v. Hughes, 321 U.S. 1 (1943); United States v. Berrios, 501 F. 2d 1207 (2d Cir. 1974).

The Supreme Court has recognized that if "intentional or purposeful discrimination" is shown, Malizia's right to equal protection of the laws has been violated. Snowden, supra at 8. See also, United States v. Berrigan, 482 F.2d 171, 179 (3d Cir. 1973); United States v. Wilkinson, 389 F. Supp. 465 (W.D. Pa.), aff'd. 521 F.2d 1400 (3d Cir. 1975).

The government policy in question, as set forth in United States Attorney's Manual, 9-2. 142 (1-10-77),* apparently allows dual prosecutions only if appropriate approval is obtained in the manner set forth.

The affidavit of the prosecutor states that approval of this prosecution was sought on June 24, 1977** and was finally obtained on August 8, 1977. There is no independent documentation of this approval in the record.

Clearly, the government has conceded that the dual prosecution policy applies to Malizia and, appellant submits, the timing of the events leading to the approval and the manner in which the approval was provided to the district court, raise certain questions as to the prosecution's motives and reasons for proceeding against Malizia.

*See, Affidavit of Federico E. Virella in Opposition to Defendant's Post-Trial Motions, p3.

**Several days subsequent to the filing of Malizia's post-trial motions.

Appellant requests that this Court remand the case for an evidentiary hearing to present his contentions, pro se, concerning the issues of discriminatory prosecution. These contentions relate to the government's retaliatory purpose, to finally remove Malizia from Society because of his past, which, if established, would cross the line separating the single-minded determination of an able prosecution and the obsession of a government bent on destroying an individual the government considers dangerous. Such bad faith, if shown at a hearing, should not be countenanced by this Court and our legal system.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGEMENT OF CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

J. JEFFREY WEISENFELD, ESQ.
Attorney for Appellant

J. Jeffrey Weisenfeld
Steven M. Jaeger

On The Brief

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 10 day of Nov. ,1977 at No. 1 St. Andrews Pl., NYC

deponent served the within *BRICK*
upon U.S. Atty. So. District of NY

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
10 day of Nov. 1977.

Edward Bailey

Edward Bailey

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

ROBERT B. FISKE JR.

